ONG LAI KIM & ORS.

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CRIMINAL APPEAL NO. 52-40-87, 52-41-87 & 52-39-87]
30 MARCH 1991

CRIMINAL PROCEDURE: *Rape and robbery - Use of one way mirror in identification parade - Proper procedure - Valid and proper - No express provision in Criminal Procedure Code - English principles applied - Showing of photographs of suspects to victims - Sentence - Adequacy - Public interest - Deterrence - Light rotan - Youthful offender - Criminal Procedure Code, ss. 5, 113(iii), 376, 392.*

The three appellants were found guilty of rape under s. 376 of the Criminal Procedure Code, CPC and the 1st and 2nd appellants were also found guilty of robbery under s. 392 of the CPC. The three appellants were identified by the victim Miss X at three separate identification parades with the use of a one way mirror.

The appellants' appeal against conviction and sentence was on the following grounds:

(a) the learned President had erred in law and in fact in deciding that the use of one-way mirror in identification parades was valid and proper. It was contended that such method had not been known, recognised, practiced and accepted in any Court in this country;

(b) that it was irregular for the police to show Miss X some photographs of suspects believed to be involved in the alleged rape and robbery.

The prosecution submitted that the order of 10 strokes of light rotan which was made against the 1st appellant, who was 17 years old at date of the offences, was not proper as under s. 288(iv) of the CPC, light rotan was only inflicted on youthful offenders, who were defined in the CPC as being between the age of 10 and 16 years.

Held:

[1] Since there is no express provision in our law relating to the procedure for holding an identification parade by using a one-way mirror, the English procedure, whereby an identification parade involving the use of one-way mirror was allowed to be held in the presence of the suspect's solicitor, friend or an appropriate adult, is applicable to the present case by virtue of s. 5 of the CPC.

[2] In this case, there was no evidence to show that the police had denied the friends or solicitors of the appellants from being present during the identification parade - the appellants had not retained Counsel at the time when the identification parades were held but these identification parades must be held to complete the police investigation.

[3] From the evidence, the police had to adopt the one way mirror procedure to hold the identification parades because Miss X was too scared to face her assailants. The identification parade in this case was conducted fairly and regularly.

[4] It is not objectionable for police who are seeking information as to the persons who may have committed a crime, to show the persons who are able to identify the criminal, a photograph or series of photographs to see if these persons can pick out any one of them who resembles the person whom they think they will be able to identify.

[5] An examination of the charge sheet and the probation report show that the 1st appellant was an adult at the time the offences were committed and therefore, the Judge exercised his power under ss. 325 and 316 of the CPC and ordered that the order of light rotan be substituted with whipping for adult offenders.

[6] The punishment inflicted for grave offences like rape involving violence should reflect the revulsion felt by the society and should act as a deterrent not only against the appellants and also against others.

[Appellants' appeal against conviction and sentence dismissed; prosecution's appeal against sentence of 1st appellant allowed.]

Cases referred to:
Chan Sin v. PP [1949] 15 MLJ 106
R v. Roberts [1982] 1 All ER 60

Legislation referred to:
Criminal Procedure Code, ss. 2, 5, 113(iii), 173(m)(2), 288(iv), 316, 325
Evidence Act 1950, s. 114illus.(e)
Penal Code, ss. 376, 392

Other sources referred to:
Archbold's Criminal Pleading and Practice, 43 Edn., p. 1148
Criminal Law, 5th Edn., p. 6., J.C. Smith & B. Hogan
Mallal's Criminal Procedure 4th Edn., p. 155
Sarkar's Law of Evidence 13th Edn., p. 98

For the 1st & 2nd appellants - S. Thayaparan; M/s. A.J. Ariffin, Chong & Harpal
For the 3rd appellant - T. Gunaseelan; M/s. Wan Majid & Mano
K.K. Wang, DPP

[**Editor's Note:** The following cases were heard together at this High Court sitting:
1. Koh Kok Thiam v. PP (Criminal Appeal No. 52-41-87)
2. Soo Thiam Lai v. PP (Criminal Appeal No. 52-39-87)]

JUDGMENT

Zakaria Yatim J:

The three appellants were tried jointly in the Sessions Court for offences of rape and robberies under ss. 376 and 392 of the Penal Code respectively. There were separate charges against each of the appellants. The first charge against the first appellant was that on 23 April 1986, between 12.30 a.m. and 1.30 a.m. at an unused mining area at Kepong in the City of Kuala Lumpur, he raped a lady aged twenty seven years (hereinafter the lady is referred to as Miss 'X') and thereby committed an offence punishable under s. 376 of the Penal Code. The second charge against the first appellant was that on the same date and at about the same time, and at the same place, he jointly with three others robbed Miss X of her car, her gold necklace, two bracelets, a Gucci watch, a ring and an anklet worth RM30,500 and thereby committed an offence under s. 392 of the Penal Code. The second and third appellants also faced similar charges separately.

The learned President found the three appellants guilty of the rape charges and the first and second appellants guilty of the robbery charges. They were convicted. The first appellant was sentenced to ten years imprisonment with effect from the date of arrest and ten strokes of light rotan in respect of the rape charge and eight years imprisonment with effect from

the date of arrest and four strokes of light rotan in respect of the robbery charge. The second appellant was sentenced to fifteen years imprisonment with effect from the date of arrest and ten strokes of whipping in respect of the rape charge; and eight years imprisonment with effect from the date of arrest and four strokes of whipping in respect of the robbery charge. The third appellant was sentenced to fifteen years imprisonment with effect from the date of arrest and ten strokes of whipping in respect of the rape charge; and he was acquitted and discharged in respect of the robbery charge. The appellants appeal against conviction and sentence.

The facts of the case are that on 23 April 1986 at about 9.30 p.m. one Miss X went for a business dinner at the Hotel Equatorial. She went there in her car. The dinner ended close to midnight and she left Hotel Equatorial for home in her car. At about 12.30 a.m. on 23 April 1986 she was travelling along Jalan Maarof. When she arrived at the end of Jalan Maarof and was going towards Jalan Damansara, a car knocked into the rear of her car. Her car was moving at that time. When the car knocked at the rear of her car, her car jerked and she stopped. She got down to examine the damage done to her car. When she got out of her car, three male persons from the other car came out and pretended to see whether there was anything wrong with Miss X's car. She saw no major damage to her car and decided to get into her car. When she was about to get into her car, the three male persons grabbed hold of her. She screamed and put up a struggle. One of them held her by the neck and another held her arm. They overpowered her and pushed her into the rear seat of her car. One of them drove her car. The other car followed. They took her to a disused mining pool. They stopped the car and asked Miss X to get out. They then asked her for money but when she said she did not have any money they took away all her jewellery and her watch. Then they waited for the others in the other car to join them. Later these male persons, *viz;* the first, second and third appellants and another person raped her. After raping her, the appellants and their friends drove away from the disused mining pool. Miss X was made to sit at the back seat of her car. When they reached a palm oil estate they opened the door of Miss X's car and pushed her out of the car. With the help of the guard from the estate she went to Bukit Travers Police Station and lodged a report.

The learned President, in her grounds of judgment stated that from the evidence before her she was satisfied that the ingredients under s. 376 had been proved namely, that there was sexual intercourse between each of the appellants and Miss X; that there was penetration in every intercourse and that the intercourse was without the consent of Miss X. The learned President also stated that from the evidence before her the prosecution had proved all the ingredients under s. 392 of the Penal Code namely, that the first and second appellants committed theft; that they caused wrongful restraint to Miss X; that they did so in committing the theft and that they did so voluntarily.

From the evidence I find that the prosecution had made out a *prima facie* case against all the appellants in respect of all the charges against the appellants except the charge of robbery against the third appellant. In her grounds of judgment the President gave her reasons, based on the evidence, why the prosecution had made out a *prima facie* case against the appellants. She admitted however that she made a mistake in not acquitting and discharging the third appellant at the close of the case for the prosecution in respect of the robbery charge. In any event the third appellant was acquitted at the end of the case for the defence in respect of that charge. In my view no miscarriage of justice was done to the third appellant.

At the hearing of the appeal, the appellants relied on several grounds of appeal. The first main ground of appeal was that the learned President erred in law and in fact in deciding that the use of one way mirror in identification parade was valid and proper. According to the appellants, such method had not been known, recognised, practiced and accepted in any Court in this country.

According to the evidence in this case, the three appellants were identified by Miss X at three separate identification parades and the appellants were identified by Miss X from an adjoining room through a one way mirror.

The identification parades were described by Inspector Amidon bin Adnan who held the parades at the request of the investigation officer, Inspector Siti Azzah. In his evidence, Inspector Amidon said that on the morning of 23 July 1986 he proceeded to hold the first identification parade in respect of the third appellant at Sentul Police Station. The third appellant was kept in the lock-up at Jalan Bandar police station before he was taken to Sentul Police Station. Miss X was in the OCPD's office at the Sentul Police Station. Inspector Amidon gathered nine persons to participate in the parade. They were of about the same age, same race and almost similar in built and height as the third appellant. The third appellant was about twenty years old. These nine persons were assembled in a room in a building separate from the OCPD's office. They were standing in a straight line. Inspector Amidon had earlier tied strings across the room with numbers from one to ten above their heads. On each number he marked an arrow pointing downwards to the heads of the participants. After the nine participants had assembled in the room, he brought in the third appellant. He explained to him the purpose of the parade and that the identification would be done through a one way mirror. He asked the third appellant whether he objected to any of the participants or to the arrangement and the third appellant replied "no". He also asked whether the third appellant wished to change his clothes or comb his hair and he replied "no". He then asked the third appellant to choose his position in the parade and he chose the position between numbers two and three.

Inspector Amidon then left the room. When he left the room he instructed a police personnel to look after the room. Inspector Amidon then went to an adjoining room. A woman constable brought Miss X to the adjoining room. The woman constable then left, leaving Inspector Amidon and Miss X in the adjoining room. He then told Miss X the purpose of her presence there and explained to her that the identification parade would be conducted through a one way mirror. He then asked her to identify the person who raped and robbed her through the one way mirror by indicating the number immediately above his head. When Miss X entered the room the mirror was covered with a curtain. He drew the curtain when he asked Miss X to identify the person. After looking through the mirror for about two to three minutes, Miss X said, "No. 3 ... He was the only one who raped me." She nearly broke down. Inspector Amidon then sent her back to the OCPD's room escorted by a woman constable. He then dismissed the parade and sent the person identified away from the room.

On the same day at about 4.20 p.m. he conducted a second identification parade at the same place. The same procedure was adopted. At this parade Miss X identified the second appellant through the one way mirror as the person who raped and robbed her.

On 17 August 1986 Inspector Amidon conducted a third identification parade at the same place. The same procedure was adopted. At this parade Miss X identified the first appellant as the person who raped and robbed her.

The question for the Court to consider is whether the identification of a suspect standing at an identification parade by a victim of rape and robbery by looking through a one way mirror is a valid and proper identification?

There is no specific provision in our Criminal Procedure Code or in the Evidence Act regarding the procedure for identification parade. Reference was made in the old s. 113(iii) of the Criminal Procedure Code to a statement made in the course of an identification parade. But the whole of s. 113 was substituted by a new s. 113 *vide* Act A324 which came into effect on 10 January 1976. The present s. 113 makes no reference to identification parade.

The practice of holding a proper identification parade in this country has been summarised in *Mallal's Criminal Procedure*, 4th Edn., at p. 155. But the practice does not include an identification parade by way of a one way mirror.

In England, it is proper to hold an identification parade to identify a suspect by using a one way mirror. *Archbold's Criminal Pleading and Practice*, 43 Edn., states at p. 1148 as follows:

> A parade may take place either in a normal room or in one equipped with a screen permitting witnesses to see members of the parade without being seen. The procedures for the composition and conduct of the parade are the same in both cases, subject to para. 7 below (except that a parade involving a screen may take place only when the suspect's solicitor, friend or appropriate adult is present or the parade is recorded on video). Once the parade has been formed, everything afterwards in respect of it shall take place in the presence and hearing of the suspect and of any interpreter, solicitor, friend or appropriate adult who is present (unless the parade involves a screen, in which case everything said to or by any witness at the place where the parade is held must be said in the hearing and presence of the suspect's solicitor, friend or appropriate adult or be recorded on video).

Since there is no express provision in our law relating to the procedure for holding an identification parade by using a one way mirror, the English procedure as stated in the passage quoted above is applicable to the present case by virtue of s. 5 of the Criminal Procedure Code. Therefore, the use of the one way mirror to identify the three appellants was proper in the present case. According to the English procedure, an identification parade involving the use of the one way mirror may only be held in the presence of the suspect's solicitor, friend or an appropriate adult.

In the present case no solicitors were present when the identification parades were held. There is no evidence that the appellants had retained Counsel when the identification parades were held. Indeed the second and third appellants were not even represented by Counsel at the trial. There is no evidence to show that the police had denied the appellants to have their friends or solicitors present. The appellants just had no solicitors at the time when the identification parades were held. But the identification parades must be held to complete the police investigation.

From the evidence, the police had to adopt the one way mirror procedure to hold the identification parades, because Miss X was too scared to face her assailants. Inspector Leong Li Leng, in her evidence said:

> The complainant was not willing to attend an identification parade. She informed me that she did not want to see again the suspects personally as she's too scared to do so.

It was for that reason that the police decided to adopt the one way mirror procedure. I think the police were justified in making such decision.

There were ten participants including the suspect, taking part in the identification parade. As stated earlier the participants were of about the same age, the same race and almost similar in built and height as the appellants. The appellants were asked to choose their positions in the respective parades. The learned President, in her grounds of judgment stated that she was satisfied "that the identification parade was conducted fairly and regularly". I agree with her finding. See *Chan Sin v. PP* [1949] 15 MLJ 106 at 108.

Before the appellants were arrested, Inspector Siti Azzah showed Miss X some photographs of suspects believed to be involved in the alleged rape and robbery. This issue was raised by the appellants at the hearing of the appeal. The learned DPP submitted that it was not irregular for the police to show Miss X the photographs. I agree with the learned deputy. *Sarkar's Law of Evidence*, 13th Edn., at p. 98 states:

> There is no objection to the police who are seeking for information as to the person or persons who may have committed a crime showing the persons who are able to identify the criminal a photograph or series of photographs to see if they can pick out any one of them who resembles the person whom they think they will be able to identify. What is objectionable is, if a witness has identified an accused person, for the police to try and corroborate the evidence of that witness by showing him, or her photograph of the actual person whom they have already identified.

Encik Wan Majid, Counsel for the first appellant submitted that the learned President had wrongly admitted the cautioned statement made by the first appellant. The cautioned statement was admitted after a trial within a trial was held. The learned President, when admitting the cautioned statement said:

> I'm satisfied that there has been only an omission of the three words, namely "atau menjawab apa-apa" during the writing of the caution by the recording officer and that the caution was properly administered.
>
> I'm also satisfied that the inducement made by one of the interrogating officers, as claimed by the 3rd accused, was insufficient to lead him to suppose that he would gain an advantage of a temporal nature.
>
> As such, I admit the cautioned statement.

I have considered the evidence adduced during the trial within trial and I have no reason to disagree with the decision of the learned President.

I have gone through the notes of evidence and the grounds of judgment of the learned President and after hearing the submissions of Counsel for the appellants and the reply by the learned DPP, I dismissed the appeal of the three appellants against conviction.

On the question of sentence, the learned DPP submitted that the order of ten strokes of light rotan made by the learned President against the first appellant was not a proper order. She referred to the probation report of the first appellant which states that the age of the first appellant at the time the offences of rape and robbery were committed, was 17 years 11 months. According to her, under s. 288(iv) light rotan was only inflicted on youthful offender. Under s. 2, a "youthful offender" is defined as a child convicted of an offence punishable by fine or imprisonment who is above the age of ten and under the age of sixteen years. The learned DPP asked the Court to exercise its power of revision under s. 325 read with s. 316 of the Criminal Procedure Code to alter the nature of whipping to that of whipping for adults.

Mr. Gunaseelan, Counsel for the first appellant submitted that there was no direct evidence to prove that the first appellant was not a youthful offender. He referred to the particulars written on the charge sheet where the appellant's age is 17 years 11 months. He also referred to the evidence of the appellant during the trial where he said his age was 18 years. Mr. Gunaseelan said that there was no direct evidence to show that the first appellant was not a youthful offender. He added that the evidence given by the first appellant of his age was inadmissible. He urged the Court not to alter the order of light rotan but to release him forthwith since he had already served four years eight months in prison.

In my opinion, the age of the first appellant can be determined from the charge sheet and his probation report. See s. 114(e) of the Evidence Act. The probation report was admitted as an exhibit and it was not challenged by the first appellant. Since the first appellant was an adult at the time the offences were committed, under s. 173(m)(2) the sentence passed against him must be according to law. Therefore I exercise my power under s. 325 read with s. 316 of the Criminal Procedure Code, and order that the order of light rotan be substituted with whipping inflicted against adult offenders.

The sentence against the first appellant is therefore ten years imprisonment with effect from the date of arrest and ten strokes of whipping in respect of the offence of rape and eight years imprisonment with effect from the date of arrest and four strokes of whipping in respect of the offence of robbery.

In my opinion the above sentence and the sentences passed by the learned President against the second and third appellants are not manifestly excessive, taking into consideration all the circumstances in the present case.

The offence of rape is rampant in this country. The Court will be failing in its duty if it does not impose a deterrent sentence in this case. The punishment must not only deter the appellants from committing a similar offence in the future but it must also deter others from committing such an offence. The punishment inflicted for grave offences including the crime of rape should adequately reflect the revulsion felt by the great majority of society. See *J.C. Smith & B. Hogan, Criminal Law,* 5th Edn., p. 6.

In this case therefore the punishment has to be sufficiently harsh and proportionate to the harm done, otherwise society will feel that the punishment is manifestly inadequate. The punishment must also reflect public disapproval of the crime committed by the appellants. See *R v. Roberts* [1982] 1 All ER 60 at 61.

Similarly, the punishment for the robbery offence must also be deterrent in nature. The appellants are no doubt first offenders but as they have been convicted of serious crime involving violence, the primary consideration of the Court is the element of public interest and society's abhorrence of this type of crime. See *Goh Chung Wee v. Public Prosecutor Federal Territory* Criminal Appeal No. CR. 52-60-87 dated 2 April 1988 (unreported).

For the reasons stated above I dismiss the appeal against sentence by all the three appellants. As already stated the order for light rotan against the third appellant is substituted with an order for whipping for adults.

Also found at [1991] 2 CLJ 1568